

From: [Celeste, Laurel](#)
To: [Huggins, Richard](#)
Subject: FW: Follow-Up on Subtitle D Standard
Date: Thursday, December 6, 2018 5:59:03 PM
Attachments: [56FedReg2WednesdayOctober.pdf](#)
[City of New York v US E P A.PDF](#)
[American Textile Mfrs Institute Inc v Donovan.pdf](#)

From: Fawal, Margaret K. <MKFawal@Venable.com>
Sent: Friday, August 31, 2018 12:06 PM
To: Celeste, Laurel <celeste.laurel@epa.gov>; Michaud, John <Michaud.John@epa.gov>
Cc: Green, Douglas H. <DHGreen@Venable.com>
Subject: Follow-Up on Subtitle D Standard

John and Laurel,

Following up on our discussion yesterday, we wanted to bring to your attention information that may be relevant to the government's decision on whether seek to seek rehearing on the portion of the Court's decision finding arbitrary and capricious the CCR rule's allowance for unlined impoundment to remain operating unless and until they exceed a GWPS or cannot meet a location restriction. As we discussed briefly, the Court construed the Subtitle D protectiveness standard in a manner akin to the "precautionary principle"—if the record an unlined impoundment has a 36 – 57% chance of leaking at harmful levels, then all unlined impoundments cannot be allowed to operate (even though the record demonstrates that a portion will not leak). We think this stretches the "no reasonable probability of adverse harm to health or the environment" standard beyond its plain meaning and is at odds with EPA's own construction of the standard as set forth in the attached preamble to the 1991 MSWLF rules (56 Fed. Reg. 50982-84). While most of the preamble discussion involves the statutory text in 4010(c) and the statutory standard for MSWLFs, EPA also discusses the degree of protection that Congress intended EPA to employ under the "no reasonable probability" standard under 4004(a), which the Court construed in this case. Importantly, EPA found that this language implied some degree of flexibility in balancing risks with other factors and certainly the Subtitle D standard was not as demanding as the Subtitle C standard (the most relevant discussion is on pages 50983-84). EPA also cites to case law construing the word "reasonable"—in other contexts—to allow for a balance of competing factors. In other words, allowing for some modicum of risk that does not appear to be allowed for under the Court's construction of the Subtitle D standard. Those cases are attached here as well.

We thought that this information might be useful to you.

Regards,

Maggie

Margaret K. Fawal, Esq. | Venable LLP



MKFawal@Venable.com | www.Venable.com

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